No. 15331.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUAN GUTIERREZ-SOSA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statement of Jurisdiction.

On January 19, 1956, appellant filed in the United States District Court for the Southern District of California a Complaint for Judicial Review and Injunction. [Tr. 2-15.]* On February 7, 1956, a Temporary Restraining Order previously issued was discharged and injunctive relief denied. [Tr. 14.] On February 9, 1956, an Answer to the Complaint was filed by appellee. [Tr. 11-13.]

On April 10, 1956, the case was tried before the Honable William M. Byrne, and on July 2, 1956, the relief prayed for in the Complaint was denied and judgment rendered in favor of the defendant. [Tr. 15-17.]

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*Tr. will refer to the Clerk's Transcript of Record.

The District Court had jurisdiction pursuant to the provisions of Title 8, United States Code, §§1254(e), 1329, and Title 5, United States Code, §1009.

This Court has jurisdiction of the appeal pursuant to the provisions of Title 28, United States Code, §1291, and Rules 73 and 75 of the Federal Rules of Civil Procedure, Title 28, United States Code.

Statement of the Case.

Appellant is a Mexican alien who illegally entered the United States on or about April 20, 1951. [Tr. 15.] On July 14, 1954, a warrant for his arrest was issued by the Immigration and Naturalization Service, charging that he was subject to deportation under 8 U. S. C. §1251(a)(2), in that he had entered the United States without inspection. A deportation hearing upon such charge was held at Los Angeles, California, on April 8, 1955, at which time appellant was held deportable. [Tr. 16.] This particular aspect of the decision is not in controversy, as appellant concedes deportability. [Tr. 26; App. Br. p. 3.]

Pursuant to the provisions of 8 U. S. C. §1254(e), appellant applied in said hearing for discretionary relief which would allow him to depart voluntarily from this country. Said code section requires that an alien so applying, must "establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure. . . ." However, 8 U. S. C. §1101(f) provides:

> "No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

"(2) one who during such period has committed adultery."

The Special Inquiry Officer found that adultery had been committed by appellant during the five-year period. [Tr. 14b.] Appellant married one Maria Cervantes in 1947. [Tr. 14n.] In 1950, he commenced living with Celia Aguilar in Los Angeles as man and wife, and continued to do so without benefit of ceremony until June 19, 1954, at which time he entered into an invalid marriage with her. On September 2, 1955, appellant divorced in Mexico Marie Cervantes. On October 24, 1955, he entered into a valid ceremonial marriage with Celia Aguilar. [Tr. 14n.]

Because of the determination of adultery, the Special Inquiry Officer found that §1101(f)(2) "precluded the finding of good moral character," and that, therefore, appellant was "not statutorily eligible for voluntary departure . . ." [Ex. A, Discussion of October 31, 1955, pp. 2-3.] In view of the foregoing language, it probably should be presumed that the only reason for the Officer's finding of bad character was because he thought §1101(f)(2) was applicable; that no determination of character was made on the merits; and that if §1101-(f)(2) is inapplicable to this case, the Officer might have been persuaded to find good moral character.

Appellant's contention was then, and is now on appeal, that the question of good moral character should not be determined by §1101(f)(2), which became effective on December 24, 1952 as part of the Immigration and Nationality Act of 1952, but by the pre-1952 law. The old statute, 8 U. S. C. §155(c), required proof of good moral character for five years, but it contained no *mandatory* finding of bad moral character by reason of an alien's

adultery within the period. Thus, under the old law, an adulterous alien had the right to *persuade* the Attorney General of his good moral character; *i.e.,* adultery would not have been *conclusive* of bad moral character. See *Petitions of Rudder,* 159 F. 2d 695 (C. C. A. 2, 1947); *Application of Murra,* 178 F. 2d 670 (C. A. 7, 1949). Under the new law, a finding of adultery precludes a finding of good moral character. Appellant reasons that since before the 1952 Act he would have had a right to have his conduct determined by the pre-1952 standards, this was a "right" or "status" within the meaning of the Savings Clause of the Act, 8 U. S. C. §101 note, and that the Savings Clause preserves his "right" under the old law. The Savings Clause (§405(a)) of the Act, as applicable here, reads:

> "Nothing contained in this Act . . . shall be construed to affect . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such . . . statuses, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are . . . hereby continued in force and effect."

Appellant appealed the Special Inquiry Officer's ruling to the Board of Immigration Appeals [Tr. 16], which affirmed the lower decision. A Complaint for Judicial Review was brought in the United States District Court, in which case relief was denied and judgment rendered against appellant, from which judgment he appeals to this Court.

ARGUMENT.

I.

Appellant Acquired No Right Prior to the 1952 Act and Therefore Had Nothing Which the Savings Clause Could Preserve.

Appellant's contention first should be clearly stated. Point I in his brief, and the only point, is that "The Status He Had Entered Into With the Woman He Subsequently Married Was a Condition Which Existed When the Act Went Into Effect on December 24, 1952." As stated, the status to which appellant refers is adultery, and not an immigration status, for he speaks of entering into that status with the woman now his wife. The Savings Clause does not save nor the 1952 Act take away any such status or condition of adultery from appellant. Appellant would probably agree that it is not the status of adultery that he wishes preserved. Instead, his contention must be that before the 1952 Act, he would have had the right to attempt to prove his good moral character, in spite of admitted adultery. The 1952 Act, particularly §1101(f)(2), mandatorily requires a finding of bad moral character if it is established that the alien during the five-year period has committed adultery. Therefore, the right contended to be preserved by the Savings Clause is the right to prove good character on the merits, unhampered by the rigid definition thereof in the new Act.

If such a right existed, it must have had a beginning. Yet appellant does not enlighten us as to how that right or status sprang into existence. No action was taken by him whatsoever to make legal his immigration status from the time he illegally entered the country in April, 1951, until the hearing in April, 1955. True enough, *if* appellant had been apprehended, and *if* he had been declared

deportable, and *if* he had applied for voluntary departure, then he would have been eligible to prove his good character. But the simple fact remains, none of these conditions occurred. Therefore, if appellant had a right to prove good moral character prior to the 1952 Act, then it must have arisen merely because of his illegal presence in the United States. The Trial Judge stated that this would be akin to determining the basis of a person's eligibility for parole prior to the time he was imprisoned. [Tr. 45-47.] Therefore, it was held that appellant could not have had a right to have discretion exercised as to voluntary departure until there was a finding of deportability. [*Ibid.*]

The cases support the Judge's reasoning. It is true that Courts have recognized that a right to have good moral character determined by pre-1952 standards can be preserved by the Savings Clause. Nevertheless, in such cases, some determination by the Attorney General under the old law was possible. In *United States v. Shaughnessy,* 221 F. 2d 578 (C. A. 2, 1955), an admittedly deportable alien applied for voluntary departure in 1953, and again in 1954 under 8 U. S. C. §1254(e), and, as in the instant case, the application was denied as a matter of law because the alien's commission of adultery precluded, under §1101(f)(2), a finding of good moral character. The Court of Appeals reversed, holding that the Savings Clause operated so as to force the Attorney General to determine good character under the pre-1952 standards. The *Shaughnessy* case, however, was bottomed on the fact that a petition for an immigration visa had been filed on the alien's behalf "more than three months before December 24, 1952, when the new legislation went into effect." (*Ibid.*, p. 579.) The language of the opinion indicates that the alien had a preserved immigration status

only because there was some action the immigration authorities could have taken under the old law:

> "We turn then to the crucial question of the applicability of 8 U. S. C. §1101(f)(2) to Zacharias. Did the *filing of the petition* for issuance of an immigration visa by his American wife give Zacharias 'any status, condition, right in process of acquisition . . . done or existing,' at the time the 1952 Act went into effect?
>
> * * * * * * * *
>
> "We conclude that the *preliminary application* for the visa in September, 1952, was sufficient to bring Zacharias within §405(a). This application was the first step in his effort to attain a legal status in this country . . . Zacharias' subsequent request for voluntary departure . . . *was squarely based on this visa application and should be considered to relate back to it.*" [Emphasis added.]

Since the instant appellant cannot "relate back" his request for voluntary departure to any previous action, the *Shaughnessy* case is no authority for his position. A District Court case, not cited by appellant, *Petitions of F. G. and E. E. G.*, 137 F. Supp. 782 (D. C. N. Y., 1956), likewise held, with respect to a petition for naturalization, that the two petitioners were entitled to a determination of good moral character, and that the rigid standard of §1101(f)(2) could not be used to preclude arbitrarily a finding of such character. In that case, both petitioners had been admitted for lawful permanent residence before 1952, but they had committed adultery with each other during the requisite five-year period. The Court's holding that petitioners had a right in process of acquisition was based upon the fact that petitioners had a lawful immigration status which would have entitled them to be natural-

ized after the lapse of a five-year period, assuming good character requirements could have been met.

> ". . . the male petitioner's *admission for permanent residence* in 1947, and the female petitioner's *admission for permanent residence* in 1908, gave them, so far as naturalization was concerned, a 'right in process of acquisition' at the time of the passage of the 1952 Act, and . . . their status as persons of good moral character must be governed by the standard which was in effect prior to the enactment of the definition of good moral character incorporated in the 1952 Act." [Emphasis added.]

If the 1952 legislation had not been passed in that case, the petitioners therein automatically would have been eligible for naturalization if they could have proven good moral character, but the rigid definition thereof in §1101(f)(2) changed their status. In contrast to that situation, the instant appellant never would have had the right to prove his character until he was apprehended; this "inchoate right" in no way could have been ripened by the mere passage of time. Consequently, the 1952 Act did not affect appellant, and as the Supreme Court said, in *Shomberg v. United States,* 348 U. S. 540, 546 (1955):

> "If . . . nothing in the new Act *affects* petitioner . . . it is clear that rights under the savings clause have not been infringed . . . Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play." [Emphasis theirs.]

Instances of the operation of the Savings Clause other than with respect to §1101(f)(2) are contained in many cases. All such cases make clear that the alien had or would have had acquired some immigration status by reason of some prior action or non-action.

In *United States v. Menasche,* 348 U. S. 528 (1955), the alien had "filed his declaration of intention to become an American citizen before the effective date of the 1952 Act and [had] otherwise complied with the naturalization laws then in effect." (*Ibid.,* pp. 529-530.) The Court then went on to note the historical importance of such a declaration in naturalization procedure. (*Id.,* p. 531.) It also stated that its decision could have rested upon the fact that the alien had obtained lawful permanent residence and thus would have been eligible for naturalization had it not been for the new residence requirements of the 1952 Act. (*Id.,* pp. 530, 536.) In either event, a lawful immigration status had been obtained by Menasche prior to the 1952 Act.

In *Shomberg v. Untied States,* 348 U. S. 540 (1955), the alien acquired a protected status by reason of "the filing of his Form N-400, from his petition for naturalization, and, perhaps, from his fulfilment of the five-year residence requirement." (*Ibid.,* p. 543.)

In *United States v. Kershner,* 228 F. 2d 142 (C. A. 6, 1955), the alien had entered the United States as a stowaway, had remained here for more than five years, and had acquired the status of being "immune from deportation on the stowaway charge under then existing law." With respect to deportation on another ground, namely, the conviction of two separate crimes involving moral turpitude, the Court held that the alien had acquired a similarly immune status by reason of an executive pardon of one of such offenses prior to the 1952 Act.

In *United States v. O'Rourke,* 213 F. 2d 759 (C. A. 8. 1954), a similar situation existed as to a pre-1952 pardon of a narcotics offense.

In *Shintaro Miyagi v. Brownell,* 227 F. 2d 33 (C. A. D. C., 1955), the deportation proceedings were begun in 1945, long before the Act became effective.

In *Yanish v. Barber,* 211 F. 2d 467 (C. A. 9, 1954), a specific court order with respect to bail had been made prior to the 1952 Act.

In *Petition of Pringle,* 122 F. Supp. 90 (D. C. Va., 1953), an application for naturalization had been made on October 7, 1952.

Other examples may be found, but the foregoing is indicative of the fact that the instant appellant did not acquire a right to have pre-1952 standards of moral character applied to him in 1955, merely because he successfully avoided apprehension before the Immigration and Nationality Act took effect.

II.

The Savings Clause Can Preserve Rights Only With Respect to Conduct Prior to the 1952 Act.

As previously stated, appellant's adultery began in 1950 and continued until the divorce from his first wife in September, 1955. The Special Inquiry Officer based his finding that the appellant was statutorily ineligible for discretionary relief on the fact that "the respondent's extra marital relationship, between 1950 and 1954 was adulterous." [Ex. A, Discussion of Oct. 31, 1952, pp. 2-3.] The Board of Immigration Appeals affirmed the decision on the ground that "it was clear that the respondent had lived in an adulterous relationship . . . for several years prior to September 2, 1955." [Ex. A, Board of Immigration Appeals Decision, p. 2.]

The fact that appellant committed adultery after the effective date of the Immigration and Nationality Act,

December 24, 1952, makes immaterial any possible benefit appellant might have obtained by reason of the Savings Clause of such Act. Assuming, *arguendo,* that appellant's illegal presence in this country prior to passage of the Act vested him with a right to prove good moral character in a deportation hearing, the Savings Clause can only preserve such right as to his pre-December 24, 1952 conduct; it cannot operate as a blanket authorization to commit adultery after that date without incurring disadvantages as to which the Act specifically warns.

A status protected by the Savings Clause arises by reason of certain facts. In order that a status be in existence at the time the Act became effective (a specific condition precedent to the applicability of the Savings Clause), the facts must have occurred before December 24, 1952. If facts occur after that date, no status with respect thereto is in existence as of said date, obviously. In effect, the Savings Clause is remedial legislation against the operation of *ex post facto*-type laws in deportation proceedings. *Cf. United States v. Kershner,* 228 F. 2d 142, 145 (C. A. 6, 1955). Where the alien commits acts after the date of the Act, it cannot be said that the operation of the Act in any sense operates retroactively. Consequently, even assuming that the appellant had a certain status on December 24, 1952, then all that is "saved" is the right to have his pre-December 24, 1952 conduct determined by the old standards; his post-December 24, 1952 standards must be governed by those standards enacted by Congress. To do otherwise, would be to allow the shield of the Savings Clause to become a sword.

The situation may be likened to that where an alien, prior to 1952, had committed two offenses involving moral turpitude not arising out of a single scheme of criminal

conduct for which he had not been confined. Under the state of the law prior to 1952, the alien was not deportable. 8 U. S. C. §155. With the passage of the new legislation, the alien became deportable, unless the Savings Clause operated to preserve a status he may have achieved by the institution of immigration proceedings prior to the Act. In just such a case, the Supreme Court held that the alien would have had protected rights, had it not been for a specific provision to the contrary in the Act. *Shomberg v. United States,* 348 U. S. 540, 543 (1955). Assuming that no such specific provision existed, then, the alien's right to remain in the country would be protected by the Savings Clause. But suppose that in 1953, he committed two more such crimes. Would the Savings Clause protect his "status" so as to render him non-deportable despite his actions subsequent to the Act? In effect, that is exactly the precedent appellant is requesting this Court to make. For in the instant case, appellant's adultery not only occurred before, but after, the effective date of the Act. This being so, and the Special Inquiry Officer basing his finding on this fact, any beneficial status possibly achieved under the old legislation becomes completely immaterial. No status is achieved or saved with respect to post-1952 actions of the appellant.

It is significant to note that in the two cases in which the pre-1952 standards of good moral character were held preserved by the Savings Clause, *United States v. Shaughnessy,* 221 F. 2d 578, *supra,* and *Petition of F. G. and E. E. G.,* 137 F. Supp. 782, *supra,* the adultery in each had ceased prior to the effective date of the Act. In fact, in the latter case, the premise upon which petitioner's arguments were based was that:

> "[T]he acts of adultery committed by them were all prior to April 7, 1952, and that, therefore, all

> these acts were prior to the effective date of the Immigration and Nationality Act of 1952, which became effective December 24, 1952." (*Ibid.*, p. 784.)

There are two District Court cases whose facts are even more simliar to those of the instant case, and wherein the Courts applied §1101(f)(2), even though the aliens had been in the country before 1952. The possible operation of the Savings Clause was not mentioned, but this, in itself, may be significant as indicating its inapplicability.

The first case, *Evans v. Murff,* 135 F. Supp. 907 (D. C. Md., 1955), involved a stowaway who entered the United States in 1923 and whose illegal presence was not discovered until 1953. The Board of Immigration Appeals found that he had committed adultery for the past seven years. It was held, *inter alia,* that §1101(f)(2) was properly applied to the case. The Court was aware of the Savings Clause question that can arise in such situations, since *United States v. Shaughnessy, supra,* was not only cited, but quoted extensively on a point involving adultery.

In *Petition of Matura,* 142 F. Supp. 749 (D. C. N. Y., 1956), the alien entered as a stowaway in 1937 and achieved a lawful immigration status in 1946. Since 1944, he had been living in adultery with one Rose Longo. On August 13, 1955, the alien obtained a Mexican divorce from his first wife, and on November 18, 1955, lawfully married Rose Longo. On these facts, the Court held that §1101(f)(2) precluded a finding of good moral character. It should be pointed out that the facts in this case are stronger in favor of the alien there than in the instant case, since there, the alien had already achieved lawful residence in this country.

The substance of these two cases, then, is that §1101(f)(2) is properly applied to post-1952 adultery even though similar conduct occurred before 1952. Where the adultery ceased before December 24, 1952, the question of good moral character should be determined in accordance with the standards existing before the new legislation. *United States v. Shaughnessy, supra; Petition of F. G. and E. E. G., supra.*

Conclusion.

Appellant acquired no right to a determination of good character preservable by the Savings Clause, because that determination could not have been made prior to the effective date of the Immigration and Nationality Act. Even assuming appellant acquired such a preserved right, §1101(f)(2) of the Act controls the determination of "good moral character" with respect to post-December 24, 1952 conduct. Since appellant's actions after such date admittedly fall within the proscription of §1101(f)(2), the action of the Special Inquiry Officer was proper, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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